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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 252

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT AS TO JURISDICTION.

F. M. Bass,
Louis Leftwich,
Cecil Sims,
Counsel for Appellant.

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MAY IT PLEASE THE COURT:

Appellee's reply brief as to jurisdiction discusses two questions, neither of which applies to or affects the question of jurisdiction of this Court upon appeal.

It is first stated that appellant is estopped now to question the validity of Chapter 80 of the 1929 Public Acts of Tennessee. It is contended that appellant's action in suing both the original contract surety and the surety on the refunding bond was a recognition of the validity of the statute complained of. There is no merit in the contention if considered from the standpoint of a defense, and certainly the contention is without merit upon the question of jurisdic-

tion. This brief is necessarily confined to the question of jurisdiction.

The Supreme Court of Tennessee did not rest its opinion in whole or in part upon the question of estoppel but predicated it solely and entirely upon the constitutionality of the State statute in question. The question of estoppel was not raised in appellee's assignments of error in the Supreme Court of Tennessee, and therefore was not considered by that court.

Under these circumstances upon the question of jurisdiction, the following cases are controlling:

Henderson Bridge Company v. *Henderson,* 173 U. S. 592;

Grayson v. *Harris,* 267 U. S. 352.

In the case of *Henderson Bridge Company* v. *Henderson,* 173 U. S. 592, the Court of Appeals of Kentucky expressly waived any decision upon a plea of *res adjudicata* and based its opinion upon the constitutional question involved. It was urged in opposition to the jurisdiction of this Court that the plea of *res adjudicata* was good and should have been sustained by the Court of Appeals of Kentucky, and hence this Court was without jurisdiction.

This Court held otherwise, Mr. Justice Harlan saying in the opinion:

> "Upon examining the opinion of the Court of Appeals of Kentucky in this case we find that that court expressly waived any decision upon the plea of *res judicata* for the reason that some views were then pressed upon its attention that had not been presented in previous cases, and it reconsidered and discussed the main question suggested by the defense, namely, that the Constitution of the United States forbade the assessment of that part of the bridge property between low-water mark on the Kentucky shore and low-

water mark on the Indiana shore of the Ohio river. This Court therefore has jurisdiction to review the final judgment of the State court for the purpose of ascertaining whether it deprived the defendant of any right, privilege, or immunity specially set up by them under that instrument."

Henderson Bridge Company v. *Henderson,* 173 U. S. at page 609.

In *Grayson* v. *Harris,* 267 U. S. 352, the non-Federal question involved was a defense of the statute of limitations, which was ignored in the decision of the Supreme Court of Oklahoma. The validity of this non-Federal defense was asserted in opposition to jurisdiction of this Court upon appeal. This Court held that it had jurisdiction. We quote from the opinion by Mr. Justice Sutherland as follows:

"Nor need we inquire into the defense of the Statute of Limitations. The decision now under review entirely ignores it. The rule that, when the decision of a State court may rest upon a non-Federal ground adequate to support it, this Court will not take jurisdiction to determine the Federal question, has no application where, as here, the non-Federal ground might have been considered by the State court, but was not. *Rogers* v. *Hennepin County,* 240 U. S. 184, 188, 189, 60 L. Ed. 594, 597, 598, 36 Sup. Ct. Rep. 265; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 608, 43 L. Ed. 823, 829, 19 Sup. Ct. Rep. 552.

Grayson v. *Harris,* 267 U. S. at page 358.

The non-Federal question of estoppel asserted by appellee in this case was not raised by its assignments of error in the Supreme Court of Tennessee, was not considered by the Supreme Court of Tennessee and was not in whole or in part the basis of the decision. The decision rested solely and alone upon the constitutionality of the statute.

This Court therefore manifestly has jurisdiction on appeal.

The other question asserted in appellee's statement on jurisdiction involves a discussion of the *merits* of the constitutional question. It is contended that the statute in question is constitutional because it affects only the remedy and does not impair the obligation of the contract. This contention is unsound for a number of reasons, but since these questions pertain solely to the merits of the case rather than to the question of jurisdiction, we will treat this contention in our subsequent brief on the merits, as we deem it improper to reply thereto in a brief directed solely to the jurisdiction in accordance with the rules of this Court.

Respectfully submitted,

F. M. Bass,
Louis Leftwich,
Cecil Sims,
Counsel for Appellant.

I acknowledge receipt of copy of the above brief this July 12, 1935.

William Hume,
Counsel for Appellee.